

UNIVERSITY OF TARTU  
Faculty of Social Sciences  
Johan Skytte Institute of Political Studies

Kadi Erik

Protecting democracy, rule of law and fundamental rights in the European Union:  
Comparing Rationalist and Constructivist Explanations

MA thesis

Supervisor: Stefano Braghiroli, PhD

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I have written this Master's thesis independently. All viewpoints of other authors, literary sources and data from elsewhere used for writing this paper have been referenced.

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Kadi Erik

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## Abstract

The European Union (EU) shares a set of common values of democracy, the rule of law and fundamental rights. They are enshrined in the Article 2 of the Treaty on European Union (TEU) and are protected by the Article 7 of the TEU. While there are many sanctioning options for the potential member states before accession into the EU, it becomes very difficult once a state has become a member of the EU. In order to trigger the article 7, the European Commission, the European Parliament and the European Council need to agree to this solution. Even though there have been breaches to the common values, the sanctioning mechanism has never been used.

The aim of this thesis is to understand the reaction and action of the European Union towards these breach cases. There is a potential for the application of the Article 7 in two current situations, namely in Hungary and Poland. The research questions are, is it possible to make sense of the European Union and member states reactions to the breach of rule of law, democracy and fundamental rights through a constructivist or a rationalist lens? Is there a variance between institutions and key member states, according to which factors? The research was conducted using the arguments of European Commission, the European Parliament, the European Council and the three biggest member states. Their arguments towards the possible breach cases were analysed using qualitative content analysis applying the two theoretical frameworks, rationalism and constructivism. The results of the analysis show that both theoretical approaches were relevant and used by all member states but also by the institutions, therefore they should not be seen as separate, but as complimentary theoretical approaches.

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## **Introduction**

The European Union (EU) faces a rise in illiberal democracies. This trend threatens the very fundamental values of the European Union enshrined by the Article 2 of the Treaty on the European Union (TEU). The Hungarian prime minister started this trend and Poland is following in its lead. In order to understand how this will affect the European Union and what repercussions these violations to democracy, rule of law and fundamental rights will have, this thesis will analyse rationalist and constructivist explanations for the protection of these values.

There have been numerous studies conducted on the topic of autocracy and how they emerge. However it is equally as important to follow the reaction and action of the EU to this rising trend within its borders. In order to analyse and understand the arguments used by the European Union, the analysis includes the three biggest member states, the European Commission, the European Council and the European Parliament. The analysis is focused on the actions and reactions of the EU to Poland and Hungary and therefore the Polish and Hungarian official positions are not included in this research, although I am aware and acknowledge their side. Every action taken by the EU, regarding the cases of Poland and Hungary is a reaction to them.

The analysis uses two theoretical frameworks and the aim is to find out the best fit to the reaction of the EU and its key member states. The two middle-ground theories used are social constructivism and rational institutionalism. The thesis will use published statements of the member states and the press releases of the EU institutions to the situations in Hungary and Poland. The arguments will be fitted with the corresponding theory. The first hypothesis is that the member states, the European Parliament and the European Council will use arguments that use rationalist explanations to why democracy, the rule of law and fundamental rights should be protected. The second hypothesis is that the European Commission will use constructivist explanations for the protection of democracy, rule of law and fundamental rights. The thesis will test the hypotheses using the two theoretical approaches, constructivism and rationalism in

specific cases, Hungary and Poland. The research questions are: Is it possible to make sense of the European Union and member states reactions to the breach of rule of law, democracy and fundamental rights through a constructivist or a rationalist lens? Is there a variance between institutions and key member states, according to which factors?

The thesis is divided into five main chapters. The first is an introduction into the thesis. The second lays out the theoretical framework for the analysis. The third gives out the methodological construction of the analysis. The fourth chapter discusses the results and the in the final chapter there are conclusions to the results.

This thesis uses two most relevant cases of possible violations to democracy, rule of law and fundamental rights enshrined by the article 2 of the Treaty on the European Union. They are Hungary and Poland. Poland is waiting for the decision by the Council regarding the triggering of the article 7, that is a protection mechanism for the article 2. (Schinas, Wigand, McPhie, 2017) As for Hungary, a member of the European Parliament has presented a draft proposal to the Civil Liberties Committee. The proposal is for the Council to determine the potential risk to the values stated in Article 2. The Committee will vote on this proposal in June 2018 and if accepted, the Parliament will vote in September 2018. (Narillos, 2018a)

In order to analyse the position the EU has taken towards these possible violations from Hungary and Poland, the analysis will include the three biggest member states, the European Parliament, the European Commission and the European Council. The three institutions of the EU are all involved in determining possible violations to the article 2 and the three biggest member states have the most influence over EU matters. The European Parliament consists of 751 members that are directly chosen by the citizens of each member state to represent their interests. The European Commission is representing the interests of the EU and cannot take national interest into consideration when deciding on the political and strategic direction of the EU. The European Council consists of the heads of the member states, President of the European Council and the President of the European Commission. The heads of state represent the interests of the national governments and together they decide on the general political direction and priorities for the EU. The three biggest member states are Germany, United Kingdom

and France. They have the most influence in the EU. Because of Brexit the United Kingdom will leave the EU at the end of March 2019. The UK has been actively taking part of the decision-making regarding the cases of Hungary and Poland and therefore is included in this research. The member state governments represent and protect the interests of the member state.

In deciding which cases to take into consideration and when, the cases where there was a possibility for implementing article 7 were included in the research. The most important factor when deciding the timeframe in which to work in, were the sources and their content. In the Hungarian case, there was already a cause for concern earlier, possibly when the new constitution was accepted, called the Fundamental Law of Hungary in 2011 (Website of the Hungarian Government). The new constitution raised concerns about the rule of law. This was followed by the adoption of a series of new laws that raised concerns about rule of law and fundamental rights as well as democracy, which are all part of the values mentioned in the article 2 as the values upon which the EU is founded. This however does not mean that the article 7 should be triggered immediately if, for example a state is discriminating against its judges and prosecutors by suddenly lowering their retirement age from 70 to 62. Instead, it will be followed with an infringement proceeding, as stated by the article 258 in the Treaty on the Functioning of the European Union (TFEU). The Commission is in charge of starting the infringement proceedings, during which the Commission will consult with the member state in efforts to make the member state comply with the treaties of the EU. If the matter is not solved, the Commission will refer the case to the Court of Justice of the European Union. There, the Court of Justice will make a decision and if they find that the member state is in breach of a treaty, the member state needs to comply with the decision and make appropriate amendments to their national law. If the Commission finds their efforts inadequate and they are still breaching a treaty, they will be referred to the Court where financial penalties will be imposed. (European Commission, a) This means that most of the breaches to the rule of law, fundamental rights and democracy are solved using the infringement procedure mechanism. If however the breaches are consistent and serious and all institutions agree, only then can the article 7 be triggered.

In the Hungarian case, even though there were breaches to the rule of law, democracy and fundamental rights, they were followed by infringement proceedings and many were successful. Even the example with the sudden lowering of the retirement age of judges and prosecutors, used to demonstrate a possible breach, happened in Hungary in 2011 and it was resolved by the Hungarian government in 2013. (European Commission, 2013) It was only in May 2017, when the European Parliament published a press release stating that “the situation in Hungary justifies the triggering of the procedure which may result in sanctions for Hungary” (Lindner & Uldall, 2017). The European Commission has not released a press statement directly calling for the triggering of the article 7 and neither has the European Council. The decision that there is a consistent and serious breach to the values mentioned in the article 2 is a political decision for the member states and the institutions of the EU. This is why it is important to follow their argumentation for this decision and this thesis is using the two theoretical frameworks in order to understand their reasoning. Therefore the timeframe for the Hungarian case starts from the 1<sup>st</sup> of January of 2017 and ends on the 1<sup>st</sup> of May 2018. The timeframe ends with May the 1<sup>st</sup> in order to guarantee maximal inclusion of the most current information available to the research.

In the Polish case, with the change of government in 2015, the new ruling government did not respect some of the decisions made by the previous government. The judges for the Constitutional Tribunal nominated by the previous government were replaced by their own choices and some of the important judgements made by the Constitutional Tribunal have not been published. The President of the Constitutional Tribunal is not lawfully appointed. (The European Commission, 2017a, p.20) The European Commission has used the rule of law framework in order to prevent the threats to the rule of law in Poland through a dialogue with Poland. (European Commission, b) The Rule of Law framework has not yielded the results it was aiming for and therefore the Commission has released an official proposal to the European Council to trigger the article 7 in December 2017. (European Commission, 2017a) In this case, the European Commission started the proceedings of triggering the article 7 in 2017, but the European Parliament already published press releases, where there were MEP’s quoted of considering the article 7 in 2016. (Lewanowicz & Kolinska, 2016) Therefore the timeframe for the Polish case is 1<sup>st</sup> of January 2016 until the 1<sup>st</sup> of May 2018. The



timeframe ends with May the 1<sup>st</sup> in order to include all relevant and current sources in this research.

The data used to conduct the research consists of press releases of the institutions<sup>1</sup> and media sources<sup>2</sup>, where the member states governments have given comments to the topic. The institutions have all extensive press release databases. Even though there is a possibility to view recordings of the debates and other statements made in video, which was another possibility considered, those videos for the most part are not available for

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<sup>1</sup> The press releases for the Commission were retrieved from their press release database, available here: <http://europa.eu/rapid/latest-press-releases.htm>. The search was conducted using keywords 'Hungary', 'rule of law' and 'democracy' for the Hungarian case and 'Poland', 'rule of law' and 'democracy' for the Polish case. Searching with limited keywords gave the best results, as it did not contain too much, possibly excluding relevant articles, and the amount of irrelevant results was manageable. In the search the timeframe of 1<sup>st</sup> of January 2016 until 1<sup>st</sup> of May 2018 was used for the Polish case and the timeframe of 1<sup>st</sup> of January 2017 until 1<sup>st</sup> of May 2018 was used for the Hungarian case.

The press releases for the Parliament were retrieved from their press release database, available here: <http://www.europarl.europa.eu/news/en/press-room>. The search was conducted using keywords 'Hungary', 'rule of law' and 'democracy' for the Hungarian case and 'Poland', 'rule of law' and 'democracy' for the Polish case. Searching with limited keywords gave the best results, as it did not contain too much, possibly excluding relevant articles, and the amount of irrelevant results was manageable. In the search the timeframe of 1<sup>st</sup> of January 2016 until 1<sup>st</sup> of May 2018 was used for the Polish case and the timeframe of 1<sup>st</sup> of January 2017 until 1<sup>st</sup> of May 2018 was used for the Hungarian case.

The press releases for the Council were retrieved from their press release database, available here: <http://www.consilium.europa.eu/en/press/press-releases/>. Because their database has limited search options and using keywords for searching their database did not yield useful results, the press releases were found by only defining the date, which was set from 1<sup>st</sup> of January 2016 until 1<sup>st</sup> of May 2018. The press released, that contained the subject matter on the cases of Hungary and Poland were retrieved and used for the data analysis.

<sup>2</sup> The media sources were found using the google search engine retrieved from [www.google.com](http://www.google.com). The keywords used were 'United Kingdom', 'May'/'Cameron', 'Poland', 'rule of law' and 'democracy' for the Polish case, also the keywords 'Deutschland', 'Merkel', 'Polen', 'Demokratie' and 'Rechtsstaadt' were used find German sources for the Polish case and keywords 'France', 'Macron'/'Hollande', 'Pologne', 'démocratie' and 'État de droit' were used find to French sources for the Polish case.

The keywords used were 'United Kingdom', 'May', 'Hungary', 'rule of law' and 'democracy' for the Hungarian case, also the keywords 'Deutschland', 'Merkel', 'Ungarn', 'Demokratie' and 'Rechtsstaadt' were used find German sources for the Hungarian case and keywords 'France', 'Macron'/'Hollande', 'Hongrie', 'démocratie' and 'État de droit' were used to find French sources for the Hungarian case.

In order to guarantee reliability of the sources used, the articles used for the research were crosschecked and compared with other media sources on the same event they reported. Additionally the Media Bias/Fact Check, available here: <https://mediabiasfactcheck.com>, was used for informative purposes, and if there were some sources listed as unreliable, they were excluded. Still this was not used as a comprehensive tool to estimate the appropriateness for analysis, as it was done by cross checking information. Used sources include Reuters, Associated Press, the Guardian, der Tagesspiegel, Spiegel Online, Le Monde but also the Local, Budapest Beacon, Berliner Zeitung, the Chicago Tribune, because their stories matched with those of the Associated press and Reuters.

Searching with limited keywords gave the best results, as it did not contain too much, so no relevant articles were excluded, and the amount of irrelevant results was manageable. The media sources included in the analysis all were in the timeframe of 1<sup>st</sup> of January 2016 for the Polish case until the 1<sup>st</sup> of May 2018 and from the 1<sup>st</sup> of January 2017 until 1<sup>st</sup> of May 2018 for the Hungarian case.

view or they have been deleted. Therefore press releases in written form were the best option for data selection. There was only one press release unavailable; therefore this was the optimal solution.

The best option for data for the member states were media sources covering different press conferences and interviews conducted with government officials. The statements from the government officials used were only direct quotes or summarised quotes from the officials in response to the potential breaches in Poland and in Hungary. Media sources in English, German and French were included. The media sources were only taken from reputable sources and cross checked as much as possible. There were no formal press releases from those member states in response to the potential breaches and video coverage from those press conferences was also sparse, therefore the best option was to go for the written media articles.

Even though in the final data set, there were data gaps in the Hungarian case, it did not hinder the study overall. Specifically, there was missing data for the arguments for the member states, France and United Kingdom and the European Council. Even though there were comments made by all of the three member state governments regarding the Polish case, there were only comments made by the German government in the Hungarian case. The French only briefly mentioned the challenge of illiberal democracies and the risk of civil war between the liberal and authoritarian democracies, but did not address the issue directly. The British government decided to avoid answering questions about Hungarian potential breaches to democracy, rule of law and fundamental rights and the only comments about Hungary regarded the visit of the UK minister for foreign trade and the foreign secretary, who both only expressed hope for remaining close trade relationships with Hungary after Brexit. The European Council data gap is unfortunate, as there was a press release, but it is unavailable for view. All sources for the analysis were subject to qualitative content analysis using MAXQDA<sup>3</sup>.

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<sup>3</sup> MAXQDA is software for qualitative and mixed methods research

## **Protecting democracy, rule of law and fundamental rights in the European Union from the rationalist and constructivist perspective**

The two treaties the European Union is based on and draws its law from are the Treaty on the European Union and Treaty on the Functioning of the European Union. Together with the signing of the Lisbon treaty, which reformed the aforementioned treaties, the Charter of Fundamental Rights of the European Union was adopted. TEU article 2 states that the EU is based on freedom, democracy and rule of law. Therefore to breach these values is to breach the very core values of the EU itself. This would not only bring into question the very functioning of the member state that deals with those breaches but also the functioning of the EU itself. If the very core values are not respected and followed, then it would bring into question the legitimacy of the founding treaties and therefore the EU. In order to make sure member states are in line with the founding principles and values of the EU, before accession the potential member states need to follow the Copenhagen Criteria, which is there to make sure the future member state meets the standards and shares the values stated in the founding treaties. During the accession period there are many sanctioning options and the possibility to deny accession in the case of any breaches. However after the accession, sanctioning and punishment methods are limited. In order to have a mechanism that would protect the values stated in article 2 of TEU, it has the article 7, which states how possible breaches should be managed. The article 7 entails a punishment mechanism, which needs the agreement of the European Parliament, the European Council and the European Commission, in order to restrict the problematic member state's voting rights and other rights given to them by the treaties.

This mechanism has so far never been used, but there have been many breaches to democracy, fundamental rights and to rule of law. Some have been unintentional but some intentional and systematic. In the year 2000 Austria had a coalition government with the far-right Austrian People's Party. In this case the Party leader had expressed xenophobic and racist views and having these views represented in the government was clearly in contradiction with the European values and norms. Other member states condemned the government and agreed on joint diplomatic sanctions against Austria. (Black, 2000) The Austrian People's Party (APP) succeeded in forming a coalition also

in 2017, but in this case, the EU and the member states have not placed any sanctions on Austria. The APP's current agenda is containing migration, limiting the resources to fund benefits for migrants and having better relations with Russia. The main difference with the previous government back in 2000 is that the current government has stated it is in favour of the European Union. (Zalan, 2017)

In 2015 the Parliament of the European Union called for a mechanism to monitor democracy, rule of law and fundamental rights in the EU. This resolution was issued in response to the situation in Hungary, where the Prime Minister Viktor Orbán, debated readopting the death penalty, campaigned using false information to trigger fear against migrants and asked citizens' personal information together with their political preferences. (European Parliament, 2015)

The Article 2 of the Treaty on the European Union states the values that are the very foundation of the European Union. These values are "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (TEU, 2016, article 2). In order to protect these values, there is the article 7 of the TEU. It was added with the Treaty of Amsterdam in 1997 and gives out directions on how to act and what can be done if there is a possibility for breaching the article 2 or if a breach has been committed. In case of a possibility for a serious breach, one third of the member states in the European Council (also referred to as the Council), European Parliament or the European Commission, can trigger the process of implementing the article 7. The process can continue after obtaining the consent of the Parliament with an absolute majority (50%+1 of the votes). Before the Council takes a position, the member state in breach will state their position on the issue. After the statement from the member state is heard, the Council will vote on it and if 4/5 of the member states agree, that there is a clear risk for a breach of the article 2 of the TEU, the article 7 will be in effect and preventative measures are taken against the member state in risk of a breach. (EU Affairs, 2018; TEU, 201, Article 7.1)

If there is a serious and persistent breach of the article 2 taking place by a member state, article 7.2 states the following directions to enforce article 7. In order to trigger the procedure, one third of votes by member states in the Council or in the Commission is

needed. Then the parliament should give consent to the procedure by a majority (2/3 of the votes cast). If the consent of the Parliament has been given, the procedure continues by consulting with the member state in question to give their observations about the breach. Then the European Council needs to take a decision by unanimity (everyone agrees or abstains from voting) in order for the article 7 to be triggered. (EU Affairs, 2018; TEU, 2016, Article 7.2) Under paragraph 3 of the article 7, if the conditions mentioned in paragraph 2 have been fulfilled, e.g. the Council has determined that a member state has indeed breached article 2 of the TEU, then the Council can hold a vote on the suspension of membership rights from the member state in breach of the article 2. The vote needs a qualified majority from the Council to be successful. The member state, whose membership rights can be taken away from, still will be a member of the EU and has to fulfill its obligations to the EU. (EU Affairs, 2018; TEU, 2016, Article 7.3) If there are any changes to the situation, the Council can change their decision taken under the paragraph 3, and in doing so, there needs to be a qualified majority (72% of members of the Council in favor, representing 65% of the EU's population (TFEU, 2016, Article 238) when voting on such changes. (TEU, 2016, Article 7.4) When voting to determine a breach or whether to apply sanctions, the member state in question cannot vote.

Article 7 has never been used, even though there have been breaches to the article 2. There is a high voting threshold for the process of triggering article 7 in order for the decision to be as unanimous and responsible as possible. It would be very dangerous if smaller groups of member states could start taking away membership rights from other members. On the other hand, since the threshold is very high, it is also very difficult to actually get all the necessary votes to trigger these processes. There are many reasons for this. Ulrich Sedelmeier has pointed out different political obstacles for triggering the article 7.

Because there is a majority of votes needed in order to trigger the article 7, if the required votes are not successfully obtained, the member states fear to create precedence that there is no violation. It could leave a dangerous precedence, even if there is a violation, but the votes are not there to back up those claims, because of political pressure, manipulation etc. This happened in October 2015 when initiation of a

vote in the Parliament on Hungary failed because even though there was certain support for it by one political group; another feared its failure and declined. (Sedelmeier, 2017, p. 339)

Member states are involved in determining the potential breach to the article 2, which also means that member state preferences can be another obstacle. Even though member states show their sovereignty in decision making in the EU in this very delicate matter, it can be problematic. This is not only a hypothetical dilemma, but also currently Hungary has stated, they will never be in favor of sanctions against Poland. (Sedelmeier, 2017, p. 340)

In order to gain the needed votes in Parliament, we should also take into consideration the party politics. Currently the Fidesz party belongs to the political group of European People's Party (EPP). This is a large political group that holds many votes and is opposed to sanctions against Hungary. (Sedelmeier, 2017, p. 340)

In order to understand the possible use of article 7 through the rationalist and constructivist perspective this section will discuss the core theories that have existed that have tried to explain the functioning of the European Union. How and why have states that started to cooperate and why they have sought further integration in the form of the European Union.

The first theories of integration were developed after the First World War, which were federalism, transactionalism and functionalism (Sangiovanni, 2006, p. 17). Altiero Spinelli, Paul-Henri Spaak and Walter Hallerstein were the proponents of federalism. Federalism as an integration theory is focused on building a state or a unit alike, which is decentralized. This would mean that the state is divided into smaller units, which govern themselves, except for the large policy areas like monetary, foreign policy, military etc. (Sangiovanni, 2006, p. 18-19) Karl Deutch and his colleagues developed the theory of transactionalism in the 1950s. The theory mostly focuses on integration through social communication, not politics or economics. This would include necessary and naturally created relationships that cross state borders. The societal connections would integrate states and the cultural assimilation among people would create a joint identity. States would see their neighbors as a part of their own identity, not as others,

making going to war impossible. (Sangiovanni, 2006, p. 29-30). The functionalism theory focuses on function based integration that is derived from necessity. The functionalists focus on the economy and solving technical problems. This would include common postal regulations across states or railroads etc. The main theorist in this field was David Mitrany, who started developing this theory in the 1930s. According to him, if states are economically bound together, they are more likely to avoid going to war with one another. (Sangiovanni, 2006, p. 24-25) After the Second World War, scholars, who had fled to the United States like Ernst Haas and Stanley Hoffmann, started to theorize Europe, that would be interconnected, so it would never go to war again (Schmitter, 2005; Pollack, 2001). Ernst Haas developed the theory of neofunctionalism and its main competition was the theory of intergovernmentalism by Stanley Hoffmann. Neofunctionalism was inspired by the creation of the European Coal and Steel Community. It was developed and theorized from the mid 1950s through the 1970s. Ernst Haas and others created this theory in order to predict possible future developments in the European region. This became a first more comprehensive theory to explain regional integration. The main arguments for regional integration are similar economic interest, spillover and unity through crises.

They argue that the integration can only move forward through small steps, mostly problem solving or through the cooperation on mainly economic interest areas, which leads to further integration, because if one establishes economic cooperation, it needs to be backed up by other supporting regulations. This would lead to spillover, or creation of many more economic ties because of the establishment of the first few. Even if there are disagreements or issues that need to be solved, the states are more likely to solve them through mutual agreements, which leads to even closer cooperation and eventually integration. (Sangiovanni, 2006, p. 92-95) Because of the critique from the intergovernmentalists, the theory was modified in the 60s and 70s until it was neglected. The critique mainly was towards the spillover logic, because the neofunctionalists assumed that the loss of pulling back from the economic cooperation would be too great and states would only seek further cooperation. Because of the empirical evidence with the experience of the European Economic Community, the empty chair crisis and the slowing down of the integration gave reason to doubt the neofunctionalist theory itself. (Sangiovanni, 2006, p. 97) Intergovernmentalists argue that while states are likely to

cooperate on the low level politics, which is economics, the high level politics (common foreign policy, military etc.) they are not likely to give up for the purpose of better economy. The interest of each state is sovereignty and the well being of their state. But according to the intergovernmentalists, the states would never give up their power to decide on the high level politics. The only way integration can come about is when nation states still have the power to decide higher-level politics and control the process of integration (Hoffmann, 1966, p. 156-157). The new debates, supranational governance and liberal intergovernmentalism came in the 1990s. The main author for liberal intergovernmentalism is Andrew Moravcsik. He argues that integration depends on a series of rational choices made by the state leaders. These choices are dependent on the national interest of the state, its power in the international arena and the institutional framework. According to intergovernmentalists the states are in control of the integration process. (Moravcsik, 1998, p. 18, 24) The supranational governance proponents on the other hand rely on the supranational institutions, which have control over the integration process. This is also a theory developed in the 1990s and rivals the intergovernmentalist approach. Their main argument is that supranational institutions are more stable than national governments and have interests of their own. Because of their stability, they are more coherent and can achieve their goal more easily than a national government. Even though they do acknowledge the power of intergovernmental bargaining, they conclude, it doesn't explain the integration process entirely and there needs to be more emphasis on the supranational governance in explaining integration processes. (Sweet and Sandholtz, 1997, p. 314) The main authors for this approach are Wayne Sandholtz, John Zysman and Alec Stone Sweet. They base their theory on the works of Karl Deutch on transactionalism and Ernst Haas on neofunctionalism (Sweet and Sandholtz, 1997, p. 300). Another theory of integration emerged alongside the abovementioned in the 1980s and 1990s, which are rational choice institutionalism, historical institutionalism and sociological institutionalism. (Pollack, 2005, p. 362) Historical institutionalism is concerned with observing the effects of institutions over time, and concludes mainly that institutions are sticky, they are difficult to change and abolish because it needs the vote of all members of that institution. Rational choice institutionalism focuses on the collective action dilemma for which institutions can be the solution. It also relies on the notion that humans are



rational and their goal is maximizing profit. Sociological institutionalism relies on the cultural norms, which will shape human action and argues that rationality is based on the culture and societal norms. (Hall and Taylor, 1996; Pollack, 2005) Social constructivism contributes to the European integration debate, explaining political preferences and interests. They do not seek to replace the rationalist approach in explaining the institution building, but focus on how the interests of those who build the institutions are constructed. This theory only emerged in the end of the 1990s and is still used in the scientific literature today. (Risse, 2004, p. 159-161) This theory adds to the rational choice theory of fixed preferences for the actors and institutions. (Pollack, 2005, p. 365) The predominant theories to explain European integration now are rationalism and constructivist theories. (Pollack, 2005, p. 358)

### **Rationalist approach to protecting article 2**

The rational choice institutionalism stems from the study of American congressional behaviour. Rational choice theory would prescribe unstable legislative procedures for congress, as it would consist of legislators with a variety of interests and preferences, therefore it would be very difficult to maintain a stable legislative process. In reality however, the congress proved to be quite stable. The answer to this was the institution itself. The congress has a fixed set of rules of procedure and information that is feasible for congressmen through the institution. This would mean, not only the interests of the congressmen matter, but also the rules and information available by the institution. In this case it is important to note that the presence of institutions of Congress make collective action smoother and more stable lowering the transaction costs and allowing for more gain. Therefore institutions can be a useful tool for deal making and overseeing the compliance to those deals. (Hall and Taylor, 1996, p. 943)

Taylor and Hall have brought out four of the most relevant characteristics of rational choice institutionalism. First and foremost, the actors (states, firms, interest groups etc.) have fixed preferences and interests. They will also act strategically in order to maximize those preferences and interests. (Taylor and Hall, 1996, p. 944-945) Another important characteristic feature of institutional rationalism is that it sees political action

as a “series of collective action dilemmas” (Taylor and Hall, 1996, p. 945). This refers to the famous ‘prisoner’s dilemma’, meaning that the actors have different options and they need to make a suboptimal choice. Here the institution as a middleman is a great example, because as said previously, the institution can have certain rules of procedure, making better deal making easier, than if there were no guarantees in form of an institution. (Taylor and Hall, 1996, p. 945) Thirdly rational choice institutionalists stress the importance of strategic interaction. This means that actors in pursuit of certain political outcome will act in a highly strategic manner, protecting their own selfish needs and interests. Institutions can be a highly effective tool for providing information and reducing uncertainty between actors, making deal making more effective and providing better outcomes for all actors. Having insurance in form of an institution will provide more trust and therefore it can result in a beneficial outcome for all actors. (Taylor and Hall, 1996, p. 945) Finally rational choice institutionalists have an interesting approach as to how institutions originate. They conclude that institutions are formed in order to maximize actors’ preferences. The institution usually has specific functions that allow its actors to use it in order to gain maximal suboptimal outcome for all actors involved. This way of describing the origins of institutions also assumes if a more beneficial institution is created, actors will then prefer it and the other will cease to exist. (Taylor and Hall, 1998, p. 945)

According to rational choice institutionalism actors try to optimize or maximize their interests. The EU is limiting their options; therefore they try to maximize their interests within the limits or scope of available means within the EU. Actors behave in a strategic way in order to achieve their goals or realize their interests. (Risse, 2004, p. 163). According to institutionalists March and Olsen, political integration is a result of bargaining between actors to gain maximal resources and protecting their interests, which are then fixed with contracts. The outcome of these contracts is also inherently dependent on the bargaining position of the actors, meaning the actors already are able to logically determine their possible gains and what they are willing to lose in order to gain. This is called the “logic of expected consequences” (March and Olsen, 1998, p. 949). And of course the gain needs to be significantly bigger than the loss in order to consider the negotiations and possible contracts. (March and Olsen, 1998, p. 949)

## **Constructivist approach to protecting article 2**

Social constructivism stems from the study of international relations and more recently has been used to understand the European Union. (Risse, 2004, p. 159) According to social constructivism human agents cannot exist separately from their social environment and culture. (Risse, 2004, p. 160) This understanding of human agents is ontologically (what exists?) different from the realist perspective, where realists see the actions of human agents as separate units that together form the social environment and culture. (Risse, 2004, p. 160) This means that constructivism and rationalism have different perceptions how the world works. Therefore social constructivism prescribes that “social structures and agents are mutually co-determined” (Risse, 2004, p. 160-161) and most importantly, our social structures, the culture in which human agents find themselves, constitutes who we are. (Risse, 2004, p. 161) This means that our environment defines our identity. (Risse, 2004, p. 161) It is also important to note that not only does our environment constitute who we are, but we as social agents also change our culture, practices and social structures through our own activity. (Risse, 2004, p. 161) If we need to explain institution building, then agency based explanations are fine and constructivists can compliment their work by also viewing agents not only as produced by outside the system but also “political culture, discourse and the social constitution of interests and preferences matter” (Risse, 2004, p. 161). (Risse, 2004, p. 161) But if we were to further investigate the evolvement of the European Union, even the emergence of the constitutional treaties, we would also need to take into account not only path-dependency and sunk costs, but also the effect the institutions themselves have had over the interests and preferences of its own agents. (Risse, 2004, p. 161-162) According to social constructivism, actors try to do the right thing rather than to maximize or optimize their interests. The interests of the actors are embedded in their social identity. March and Olsen see actors acting according to the “logic of appropriateness”. This means that actors act in accordance with socially constructed rules and practices, meaning they act in a social situation in a way that is anticipated, expected and publicly known. (March and Olsen, 1998, p. 951-952) The actors also try to understand what are the most appropriate reaction and action in a social situation and try to follow it. (Risse, 2004, p. 163) Norms not only regulate behavior, but also constitute who we are, our identity. (Risse, 2004, p. 163) Actors’ interests, preferences

and perceptions are not fixed but relative to their discursive context. (Risse, 2004, p. 165)

## **Methodological framework for the analysis of the potential breach cases through constructivism and rationalism**

There have been two most prominent cases of potential threat to democracy, the rule of law and fundamental rights in the European Union. Those cases involve recent actions of the Polish and Hungarian governments. In Poland there is a threat to the separation of powers, specifically there is concern of the independence of the judiciary and fundamental rights. (Lewanowicz, 2017) In Hungary rule of law, democracy and fundamental rights are deteriorating. (Lindner, Uldall, 2017) In both cases there is a possibility of article 7 being triggered. In the Hungarian case, the Civil Liberties committee members of the parliament discussed the situation of democracy, rule of law and fundamental rights in Hungary on the 12<sup>th</sup> of April 2018. They concluded, that there in fact is a basis to trigger the article 7 of TEU. According to the lead MEP, Ms Sargentini, the fundamental rights are not provided for Hungarians. They are not given “honest and equal treatment by their government” (Narillos, 2018a). The Civil Liberties Committee also stated that there is a “systemic risk to democracy and rule of law in Hungary” (Narillos, 2018a). Ms Sargentini’s proposal to trigger article 7 will first be voted on by the Civil Liberties Committee in June 2018. Then the report will be voted on in the Parliament. In the Polish case, the European Commission issued a reasoned proposal for a council decision on the 20<sup>th</sup> of December 2017. The proposal is to trigger article 7(1). (European Commission, 2017) The Civil Liberties MEPs have urged the member states to haste their actions towards the situation in Poland but the decision on the adoption of the proposal is yet to come. (Narillos, Lewanowicz, 2018)

The focus of the thesis is to understand the reaction of the EU towards these potential breaches of democracy, rule of law and fundamental rights that are enshrined in the Article 2 of the TEU. In order to comprehend the action and reaction by the EU, the analysis will include the European Parliament, the European Commission, the European Council and three of the biggest member states, Germany, France and United Kingdom. The three institutions play a crucial role in deciding if a breach has been committed or if there is a clear risk for a breach and therefore if there is a need to trigger the article 7.

The three biggest member states have the most influence over affairs within the EU and their actions can solve or hinder situations within the EU. (Krotz & Maher, 2016, p. 1054; Moravcsik, 1998) Therefore their opinions in these situations could potentially influence the process of determining a risk for a breach or a breach of the article 2. On the 26<sup>th</sup> of June 2016 United Kingdom voted in favour of leaving from the European Union. It is leaving on the 29<sup>th</sup> of March 2019. (Hunt & Wheeler, 2018) United Kingdom is still currently a member of the European Union, the British members of parliament still have a right to vote and Theresa May is a member of the European Council. Therefore this analysis is including the United Kingdom as a key member state. This thesis will cover the timeframe between 1<sup>st</sup> of January 2016 until 1<sup>st</sup> of May of 2018 in the Polish case and 1<sup>st</sup> of January 2017 until 1<sup>st</sup> of May 2018 for the Hungarian case in order to ensure all relevant data is included and taken into account. In the Hungarian case, it was only in May 2017, when the European Parliament published a press release stating that “the situation in Hungary justifies the triggering of the procedure which may result in sanctions for Hungary” (Lindner & Uldall, 2017), before that, the Commission tried to resolve the possible breaches with infringement proceedings. (European Commission, a) In the Polish case, the European Commission started the proceedings of triggering the article 7 in 2017, but the European Parliament already published press releases, where there were MEP’s quoted on considering the article 7 in 2016. (Lewanowicz & Kolinska, 2016)

The sources used for the purposes of the analysis are following. The sources for the three institutions, the European Parliament, the European Commission and the European Council are retrieved from their press release databases and include all press releases that are available on the situations in Poland and Hungary.<sup>4</sup> The sources used

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<sup>4</sup> The press releases for the Commission were retrieved from their press release database, available here: <http://europa.eu/rapid/latest-press-releases.htm>. The search was conducted using keywords ‘Hungary’, ‘rule of law’ and ‘democracy’ for the Hungarian case and ‘Poland’, ‘rule of law’ and ‘democracy’ for the Polish case. Searching with limited keywords gave the best results, as it did not contain too much, possibly excluding relevant articles, and the amount of irrelevant results was manageable. In the search the timeframe of 1<sup>st</sup> of January 2016 until 1<sup>st</sup> of May 2018 was used for the Polish case and the timeframe of 1<sup>st</sup> of January 2017 until 1<sup>st</sup> of May 2018 was used for the Hungarian case.

The press releases for the Parliament were retrieved from their press release database, available here: <http://www.europarl.europa.eu/news/en/press-room>. The search was conducted using keywords ‘Hungary’, ‘rule of law’ and ‘democracy’ for the Hungarian case and ‘Poland’, ‘rule of law’ and ‘democracy’ for the Polish case. Searching with limited keywords gave the best results, as it did not contain too much, possibly excluding relevant articles, and the amount of irrelevant results was

for analysing the member states are all published articles from reputable sources<sup>5</sup> that include comments from the governments of those member states referring to the potential breaches democracy, rule of law and fundamental rights in Poland and Hungary. These sources were chosen because it is possible to retrieve written quotes and arguments made by those institutions and member states. The member states have not released any press releases regarding the situations in Hungary or Poland. Their governments have however commented on those topics during press conferences and this information is available in news publications. The articles for the purposes of this thesis that have been used are crosschecked and fact-checked. The analysis will not include any judgements or opinions of the authors of the articles, only the quotes from the government officials.

Retrieved data was used to look at the arguments made by the institutions or member states regarding those breaches. The interest in those arguments was to look at how and why institutions and member states perceived those potential breaches. Those

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manageable. In the search the timeframe of 1<sup>st</sup> of January 2016 until 1<sup>st</sup> of May 2018 was used for the Polish case and the timeframe of 1<sup>st</sup> of January 2017 until 1<sup>st</sup> of May 2018 was used for the Hungarian case.

The press releases for the Council were retrieved from their press release database, available here: <http://www.consilium.europa.eu/en/press/press-releases/>. Because their database has limited search options and using keywords for searching their database did not yield useful results, the press releases were found by only defining the date, which was set from 1<sup>st</sup> of January 2016 until 1<sup>st</sup> of May 2018. The press released, that contained the subject matter on the cases of Hungary and Poland were retrieved and used for the data analysis.

<sup>5</sup> The media sources were found using the google search engine retrieved from [www.google.com](http://www.google.com). The keywords used were 'United Kingdom', 'May', 'Cameron', 'Poland', 'rule of law' and 'democracy' for the Polish case, also the keywords 'Deutschland', 'Merkel', 'Polen', 'Demokratie' and 'Rechtsstaat' were used find German sources for the Polish case and keywords 'France', 'Macron', 'Hollande', 'Pologne', 'démocratie' and 'État de droit' were used find to French sources for the Polish case.

The keywords used were 'United Kingdom', 'May', 'Hungary', 'rule of law' and 'democracy' for the Hungarian case, also the keywords 'Deutschland', 'Merkel', 'Ungarn', 'Demokratie' and 'Rechtsstaat' were used find German sources for the Hungarian case and keywords 'France', 'Macron', 'Hollande', 'Hongrie', 'démocratie' and 'État de droit' were used to find French sources for the Hungarian case.

In order to guarantee reliability of the sources used, the articles used for the research were crosschecked and compared with other media sources on the same event they reported. Additionally the Media Bias/Fact Check, available here: <https://mediabiasfactcheck.com>, was used for informative purposes, and if there were some sources listed as unreliable, they were excluded. Still this was not used as a comprehensive tool to estimate the appropriateness for analysis, as it was done by cross checking information. Used sources include Reuters, Associated Press, the Guardian, der Tagesspiegel, Spiegel Online, Le Monde but also the Local, Budapest Beacon, Berliner Zeitung, the Chicago Tribune, because their stories matched with those of the Associated press and Reuters.

Searching with limited keywords gave the best results, as it did not contain too much, so no relevant articles were excluded, and the amount of irrelevant results was manageable. The media sources included in the analysis all were in the timeframe of 1<sup>st</sup> of January 2016 for the Polish case until the 1<sup>st</sup> of May 2018 and from the 1<sup>st</sup> of January 2017 until 1<sup>st</sup> of May 2018 for the Hungarian case.

arguments were then assigned to either a rationalist or constructivist theory. In order to understand the reasoning behind the arguments of the institutions and member states, the two theories that best could explain their action in case of a potential breach of democracy, rule of law and fundamental rights, are the rationalist and constructivist theories of international relations. The research question is: is it possible to make sense of the European Union and member states reactions to breach of rule of law, democracy and fundamental rights through a constructivist or rationalist lens? Is there a variance between institutions and key member states, according to which factors?

The European Parliament consists of representatives of the citizens of each member state. Therefore they represent the interests of the citizens that chose them as their representatives. The European Council is comprised of heads of member states and the President of the European Council and the President of the European Commission. Therefore the Council represents the interests of the member states. The European Commission is comprised of Commissioners, the President of the European Commission and the Vice-Presidents. The Commissioners are representing the interest of the EU and not the interest of their member states. The governments of the member states have the best interests of their own state in mind. Therefore I would assume, the Commission would use the constructivist notion in their argumentation. Democracy, rule of law and fundamental rights are the social norm for all member states to the union and therefore they should all protect and adhere to those values. The member states, Council and Parliament however, since it is in their interest to protect the values of their state and represent their citizens, would be more worried about the consequences of one member states breaking the article 2 and its possible repercussion to their state interests.

Hypothesis 1: The European Commission will want to protect democracy, rule of law and fundamental rights using arguments that fall in line with the constructivist theory.

Hypothesis 2: The European Parliament, the European Council and the big three member states will use arguments that fall under the rationalist theory.

The testing of those hypotheses that are derived from theories of rationalism and constructivism are done using qualitative content analysis. The texts are coded accordingly under either the rationalist or constructivist theory. The codes are derived



from the arguments retrieved from the texts. The coding is done with a qualitative and mixed methods research software MAXQDA.

## Results

While in theory there are clear differences between rationalism and constructivism, there were a number of cases where the predominant narrative was constructivist and a number of cases where the predominant narrative was rationalist.

### Case 1: Poland

The sources used for the case, were analysed using MAXQDA<sup>6</sup>. The results give an overview of all the arguments used by the key member states, the European Council, the European Commission and the European Parliament. The arguments are explained using constructivist or rationalist narratives. Before stating the results a short overview of the important events is presented in the Polish case.

Timeline for the key events<sup>7</sup>:

- October 2015 three judges for the Constitutional Tribunal in Poland were nominated to take office. After the parliamentary elections in October 2015, the newly formed government disregarded the legally nominated judges and pointed their own candidates into office. (European Commission, 2017a)
- 22 December 2015 the Polish parliament adopted a law that amends the Constitutional Tribunal, its functions and the independence of its judges (Official Journal of the European Union, 2016)
- 30 December 2015 the “small media law” was adopted by the Polish senate, which raises concerns in media (Official Journal of the European Union, 2016)
- 9 March 2016 the Constitutional Tribunal declared the law adopted on 22<sup>nd</sup> of December 2015 as unconstitutional, but the judgement has not been published in the Official Journal, therefore it is not in effect. (Official Journal of the European Union, 2016)

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<sup>6</sup> MAXQDA is a software used for qualitative and mixed methods research

<sup>7</sup> This list is not an exhaustive timeline of all events

- 13 April 2016 the Parliament adopted a resolution on the situation in Poland (Official Journal of the European Union, 2016)
- 15 September 2017 the Sejm, the Polish Parliament, nominated a person to the position of the President of the Constitutional Tribunal, and the President of the Polish Republic accepted their oath on the 18<sup>th</sup> of September 2017, even though the position was already occupied. (European Commission, 2017b)

## Germany

German government officials have mainly used arguments to protect democracy, rule of law and fundamental rights that fall under the rationalist theory. According to the rationalist theory the preferences of the actors are fixed and they follow the “logic of expected consequences”. (March and Olsen, 1998, p. 949) Also the institution, in this case the EU, has very specific functions and allowing its actors to use those functions in a regulated way will give the option for the users to gain maximal suboptimal outcome. (Taylor and Hall, 1998, p. 945) If the actors were to not comply with the rules of the institution, this would make the institution obsolete. If however other actors would want this institution, in this case the EU, to survive, they might either pressure the actor to behave according to the rules or exclude them from the institution. The German position has stressed exactly the importance of complying with the rules of the European Union, because “disrespect could undermine cooperation in the 28-nation bloc” and “it touches the basis of cooperation inside the European Union” (Casert & Moulson, 2017; Rankin, 2017; Baczynska, 2017; Associated Press, 2017; the Local, 2017). Germany’s head of state also pointed out that “it is not about the rule of law or sticking together. Sticking together in the EU while abandoning the rule of law wouldn’t be the European Union anymore” (Casert & Moulson, 2017). A German Minister for Europe in the German Foreign Office, Michael Roth also stated in an interview, that “there will be no discount on issues concerning rule of law” when asked about the potential use of article 7. This means, that Germany is protecting strongly the interests of Germany but also of the EU. Allowing breaking the very foundational rules to the Union would certainly undermine it, making suboptimal deal making more difficult. (Taylor and Hall, 1996, p. 945)

Volker Kauder, a member of CDU, said in an interview, that “the polish government needs to know that certain fundamental values in Europe cannot be infringed upon” (Müller, P., et. al., 2016). He also called for sanctions against Poland, because they violate the principle of rule of law. According to him, the EU needs to be courageous and as soon as there are violations to the values of the Union, there should also be sanctions. (Müller, P., et. al., 2016) The argument, that the EU should inherently protect its values, and because the Polish government is acting wrongfully, the EU should do the right thing and make them responsible for their actions, is a constructivist one.

Germany’s chancellor Angela Merkel’s spokesman preferred to state their close friendship, good neighbourly relations and partnership with Poland and that they would like to even further this relationship. (Müller, P., et. al., 2016) Michael Roth, a state minister responsible for European affairs, stated that they “cannot allow the current debate to lead to a bilateral conflict with Poland” (Müller, P., et. al., 2016). This can be considered under the rationalist theory an act of self-interest or protection of interests. This is due to the fact that Germany could potentially suffer more if there were a serious bilateral conflict, where trade, security etc. would be threatened. If however Germany were not to react to this breach, or even not consider it as a breach, things could also go on as usual, therefore there would be no losses in those terms.

## France

France’s government officials have used arguments that belong to both rationalist and constructivist theory.

When Emmanuel Macron visited Eastern Europe in August, he stated: “Europe is a space that has been created on values, a relationship to democracy and public freedoms that are now being violated by Poland” (Sierakowski, 2017; Tsoleva & Sobczak, 2017). The problem he is addressing in his comment is that Poland was against setting up minimum wages for the foreign workers in Europe. This would mean that there was a possibility for a polish worker to work in France for a wage that is higher than he would earn in Poland, but lower than the minimal wage for that job in France. There was a

plan to correct this with the European Posted Workers Directive. The fact that France criticised Poland for not agreeing to this new directive has many reasons, but France decided to specifically point out, that this disagreement is in conflict with the European values. Using this argument France is also pointing out that Poland should act according to what is the right thing to do, what is expected from them. (March and Olsen, 1998, p. 951-952)

On that same topic Macron also stated that Poland is going “against European interests on many issues” (Quatremer, 2017). Therefore, not only has he used the argument of protecting the values that the EU is built upon, but also stresses that the interests of the EU need to be protected. Taking the rationalist explanation to this argument, it is within the interests of the actors that all the actors abide by the rules of the institution, the EU, in order to have trust and therefore have the maximal outcome for all actors. (Taylor and Hall, 1996, p. 945) Therefore the European interests in this case can refer to all the actors that belong to the European Union. The European Union is serving the interests of all member states, which by cooperating will receive the suboptimal outcome to their collective problems. In order to ensure the suboptimal outcome however, there needs to be compliance among the members to the EU.

Macron also said during his visit to eastern Europe that Poland is “isolating itself” (Tsolova & Sobzak, 2017) from the EU and that citizens of Poland “deserve better” (Tsolova & Sobzak, 2017) than the government who is not abiding by “democratic values and economic reform plans” (Tsolova & Sobzak, 2017). (Tsolova & Sobzak, 2017) This is another argument that uses both a rationalist and a constructivist perspective. On the one hand he claims that Poland is “isolating itself” through not following the appropriate logic of action of the EU and that the citizens deserve a better government, so a government who will be in line with the expected behavior, doing the right thing. This would be the logic of a constructivist argument. Also it would be appropriate to apply the rationalist theory to this argument, because the alienation of Poland from the EU also refers to the broken trust, and therefore the other member states can no longer be sure of the compliance and this makes achieving suboptimal outcome more difficult. The institution should be there for ensuring all of its members

can cooperate in order to achieve maximal outcome for all. (Taylor and Hall, 1996, p. 944-945)

A few months after the French president visited Eastern Europe, during a joint press conference after a talk with the polish prime minister in Paris, Macron was not so critical of Poland anymore. He told the press, when it comes to the Poland's judiciary reforms, it was not up to him to criticise domestic policies of another EU member state. Macron also added, that they will wait what the European Commission concludes and if there are violations to the EU treaties then there will be consequences. As for the directive, concerning posted workers, Macron together with the polish prime minister agreed to come to a compromise. (Rose, 2017) The tone of the French head of state has certainly changed from the previous arguments made in Bulgaria during his visit to Eastern Europe. I would classify this under the rationalist approach, because he expects the institution to check and keep its actors in line with its rules, making the cooperation smooth. So the institution, the EU, is a tool, through which collective action dilemmas can be solved and all actors can pursue the maximal outcome to their collective dilemmas.

#### United Kingdom

Before her visit to Warsaw, the prime minister of United Kingdom stated her concerns over the situation in Poland. A spokesperson for the prime minister said: "we place importance for the rule of law and we expect all our partners to abide by international norms and standards" (Elgot, 2017). Stressing the importance of abiding by the rules that are set for states in order to cooperate well falls under the rationalist perspective. The international norms and standards guarantee that states can achieve suboptimal choices for them. (Hall & Taylor, 1996, p. 945)

During her visit in Warsaw May said in a press conference with the polish prime minister that "these constitutional issues are normally, and should be primarily a matter for the individual country concerned" (Gocłowski, 2017; Merrick, 2017) This was the answer to the Commission's proposal to implement the article 7 against Poland because

of its violations to the rule of law, democracy and fundamental rights. Stating this issue as a domestic policy issue, rather than a EU issue, would classify this argument under the rationalist approach. This would mean, that since the domestic policies are not an issue or of interest to the UK, there is no need to interfere or pass judgement. She also stated, that “across Europe we have collective belief in the rule of law”. (Gocłowski, 2017; Merrick, 2017) This collective belief would be an argument for the constructivist theory. According to constructivists’ the EU’s norms such as rule of law have become the social norm for also member states. The member states’ social norms and those of the EU have become the same. Member states identify themselves through those social norms of the EU. And therefore all member states should try to follow those norms. (Risse, 2004, 163-164)

#### European Parliament

The European Parliament has also reacted to the situation in Poland. Members of the European Parliament (MEPs) stated, “fundamental European values are at risk in Poland” (Lewanowicz, 2017a). They also found that there is a “clear risk of a serious breach of the European values, including [to] the rule of law, enshrined in the EU Treaty” (Lewanowicz, 2017a) and decided EU Article 7 procedure should be triggered. (Lewanowicz, 2017a) There is a threat to separation of powers, to an independent judiciary and fundamental rights. (Lewanowicz, 2017a); Narillos & Lewanowicz, 2018) This is the second time the Parliament has voted in favour of a resolution to draw up a reasoned proposal for the Council in order to trigger the process of Article 7. (Lewanowicz, 2017a) Because there is a possibility of a breach to the values in the Article 2 of the TEU, they found, triggering the article 7 would be an appropriate response. Protecting the treaties would be a rationalist approach as the member states would want to protect the treaties in order to ensure same rules for all and maintain trust among the member states. (Taylor and Hall, 1996, p. 944-945)

The Parliament has also debated on the topic of possible breaches to the rule of law in Poland. In the debate some political group representatives stated, the Polish government should stop threatening democracy and European values, others stressed, this “debate

was not against Poland but, on the contrary, expressed their support for Poles protesting in the streets against the erosion of their fundamental rights” (Lewanowicz, 2016a). The arguments that Poland should stop disrespecting democratic principles and undermining European values can be viewed as constructivist. They see as Poland needing to be “socialized” to fit the European norms. (Risse, 2004, 164) They see it as an opportunity to persuade them that there are citizens in Poland who want to follow these values and therefore the Polish government should use this opportunity and act accordingly. These European values are more than just European values, they are both the values of the member states and give them identity and logic of appropriateness. This refers to the idea, that actors, in this case the member states, will act according to their understanding of what is appropriate and the right thing to do rather than to optimize their own interests or that they even have fixed separate interests. (Risse, 2004, p. 163-164) This also means that according to the constructivist understanding the interests of the member states are not fixed, but they follow logic of best possible outcome for all actors. Their interests can be changed, if their views are challenged with a better solution, idea to the problem. (Risse, 2004, p. 165)

Another debate on the rule of law and media independence in Poland has also differing views on the matter. President of the European Parliament (2014-2017) Martin Schultz opened the debate stating “the rule of law, the question of checks and balances, is not a question of procedure but one that is central to our European democracy and society” (Lewanowicz & Kolinska, 2016). This argument is a constructivist one, referring to rule of law as an inherent value to all member states, not just a matter of a treaty member states need to abide by. Rule of law is seen as a social norm, not just an article of the treaty.

The debate carried on with the Dutch Minister of Foreign Affairs Bert Koenders saying, “the EU is more than a common market, it’s a Union built on common values – the rule of law, democracy and fundamental rights. But these cannot be taken for granted, we have learned our lesson the hard way” (Lewanowicz & Kolinska, 2016). He is using the same constructivist notion as Martin Schultz, referring to the values as the social identity and norm for members of the EU. He also stresses the importance of protecting



these common values because if they are systematically ignored, they might not be common values for all members anymore.

Polish Prime Minister Beata Szydło sees this criticism, as a political dispute, not a legal one and therefore it should be an “internal Polish matter”. (Lewanowicz & Kolinska, 2016) This is a rational argument, because it is in the Polish prime ministers interest to protect her governments actions. It is in her interest to be in power. Therefore she would act highly strategically in order to keep the necessary laws for her government. (Taylor & Hall, 1996, p. 945)

The Spanish MEP Esteban González Pons stressed their aim was to understand if there is a risk for authoritarianism for Poland, because “attacking the judicial power and controlling mass media could be the first step towards destroying democracy” (Lewanowicz & Kolinska, 2016) He also said it needs to be clear if “European values are at risk”. This argument is a constructivist argument, as it also stresses the importance of upholding European values, as they are inherent to the European community and need to be protected.

The European Parliament passed a non-binding resolution calling on “the Polish authorities to fully implement the Venice Commission recommendations on the ability of Poland’s Constitutional Tribunal to uphold its Constitution and guarantee respect for the rule of law” (Lewanowicz, 2016b) They concluded that there is a danger to “democracy, human rights and the rule of law” (Lewanowicz, 2016b) and they stressed the importance of upholding “the values and principles enshrined in EU treaties and international human rights instruments” (Lewanowicz, 2016b). They also stressed that “all steps taken must respect the subsidiarity principle” (Lewanowicz, 2016b). This means that the EU will act in areas where it does not have exclusive competence only if the action is more effective than the action of the member state. (EUR-Lex) The argument that it is important to uphold the treaties of the EU is a rationalist perspective. In order for the EU to function as an institution and its actors to be able to maximise their interests within the limitations of the EU, all of those limitations need to be the same for all actors. This will ensure trust and fair rules for all actors. If an actor is not

adhering to the treaties, then the institution will have to address it, because if actors will not adhere to the rules they agreed with, the EU will be obsolete. (Risse, 2004, p. 163)

In a debate about the Polish developments, several arguments were raised. The developments in Poland include the government preventing the three judges that were chosen by the previous Polish parliament to take office in the constitutional tribunal. There are also concerns regarding some of the tribunal's decisions not being published, while there have been adopted new laws regarding the constitutional tribunal that are possibly preventing the tribunal from functioning properly. (European Parliament, 2016)

Ivan Korčok, a Slovakian representative, stressed the “importance of fundamental rights: both the independence of tribunals and freedom and pluralism of media are indispensable elements in ensuring the rule of law in a democratic society” (European Parliament, 2016) This argument is a constructivist approach, a democratic society is seen as a value and something that needs to be upheld. A democratic society, a pluralist media and an independent tribunal are a social norm and a value to the society. (Risse, 2004, p. 165)

A Polish MEP argued, that it is natural for the EP to raise these concerns, because the Polish government could also be a threat to the Polish society if they abuse the rule of law. (European Parliament, 2016) an Italian MEP also added that they are fighting for Poland, for democracy. (European Parliament, 2016) A Dutch MEP also said that it “goes right to the heart of what European Union is all about – the rule of law, fundamental rights and democracy” (European Parliament, 2016). These are all constructivist arguments in that they see fundamental rights, democracy and the rule of law as inherent social norms and the identity of the EU and its member states.

There were also those against the debate. Ryszard Legutko, a Polish MEP, found that the EU should accept that there are different opinions on this topic. Another Polish MEP asked the Parliament to “leave Poland alone” (European Parliament, 2016) and saw this debate as an attack to his country. He saw the problem was in the European policies, not in Poland. Stanisław Żółtek, another Polish MEP, thought that the Commission is overstepping its role with the inquiries into the Polish situation and

found that the Commission wants to “overthrow this country; they want to take over and overthrow governments” (European Parliament, 2016). And a Hungarian MEP said, “we are intervening in the politics of Poland and by doing this we will be well on our way to ensuring the EU is destroyed” (European Parliament, 2016). These arguments are interesting in the sense that it is clear that there is a mismatch between some of the MEPs and others. We were able to observe a clear constructivist understanding of the situation, where common European values should be protected as they are our identity and purpose of the Union itself. The response however from the majority of the Polish and Hungarian MEP’s is completely different. They seem to argue that there are no common European values and there is an elite within the EU who tries to first push these values upon its members and if there is a mismatch, then overthrow their governments. Some also think this will destroy the EU. This response is also not a rational one; it cannot be explained with the rational choice theory.

The European Parliament also released a statement reminding the Polish government to resolve their constitutional crisis within a three-month deadline set by the Commission. The Parliament stated that the Polish people agreed with joining the EU, and therefore with the values of the EU that “operates on the basis of the presumption of mutual trust that Member States conform with democracy, the rule of law and fundamental rights” (Lewanowicz, 2016c). This is a rationalist approach, the EU is seen as an institution that creates certain rules for its member states and upholds them in order for states to have mutual trust and then operate within this institution to attain suboptimal outcome. (Risse, 2004, p. 163)

### European Commission

The European Commission commented their proposal to trigger article 7(1) of the TEU in response to the problematic rule of law situation in Poland. They state that the judiciary is under the control of the ruling majority and this raises serious concerns “about the effective application of EU law, from the protection of investments to the mutual recognition of decisions in areas as diverse as child custody disputes or the execution of European Arrest Warrants” (Schinas, Wigand & McPhie, 2017). This is a

rationalist approach to the threat to the rule of law in Poland as it explains the possible consequences if a member state is to breach the EU law and break the trust that allows the member states to cooperate together.

President of the Commission has also stated, “the commission is determined to defend the rule of law in all our Member States as a fundamental principle on which our European Union is built” (Andreeva & McPhie, 2017), because independent courts “are the basis of mutual trust between our Member States and our judicial systems” (Andreeva & McPhie, 2017). This is a rationalist argumentation, because the EU is seen as an institution with a set of principles on which mutual trust is based upon. (Risse, 2004, p. 163)

#### European Council

Donald Tusk stated, that he believes “the European Union is not just about money and procedures. It is first and foremost about values and high standards for public life” (Aamann, 2017). He sees the European Union as representative of European values and high standards for public life. Therefore the protection of rule of law is seen as a social norm and a logical course of action. This is then a constructivist approach to the situation in Poland.

#### **Case 2: Hungary**

The sources used for the case, were analysed using qualitative research software MAXQDA. The results give an overview of all the arguments used by the key member states, the European Council, the European Commission and the European Parliament. The arguments are explained using constructivist or rationalist narratives. Before stating the results a short overview of the important events is presented in the Hungarian case.

Timeline for the key events<sup>8</sup>:

- 28<sup>th</sup> April 2015 the Prime Minister of Hungary Viktor Orbán declared a public debate on the death penalty. (European Parliament, 2015a)
- May 2015 the Hungarian Government lead a national consultation discussing the migration policies, using misleading and manipulating questions, to convey their own views on the topic. (European Parliament, 2015a)
- July and September 2015 the Hungarian Parliament adopted a number of amendments to laws on asylum, the criminal code, the law on criminal procedure, the law on the border, the law on the police and the law on national defence. (European Parliament, 2015b)

## Germany

When asked about Hungary not accepting the decision of the European Court of Justice, Merkel stated, “it’s unacceptable that a government says a ruling of the European court of Justice does not interest them” (Nienaber & Evans, 2017; Orbán, 2017; Geyer & Vates, 2017). She also told, “this means that a very fundamental question of Europe is being touched – because for me, Europe is an area of the rule of law” (Nienaber & Evans, 2017; Geyer & Vates). She is using a constructivist approach to answer this question, stressing that Europe is defined fundamentally by being an area of rule of law. It is not just a question of abiding by the law, but a question of social norms and values within the European Union.

In an interview with the state minister for Europe in the German foreign office, Michael Roth, told that during an election campaign, Hungary’s Prime Minister Viktor Orbán, should not discard European values in order to win his election campaign. He stated, “The EU is more than a single market. The EU is a community of shared values that binds all its members” (Meier & Appenzeller, 2018) and that in case those values “are disregarded, you cannot just ignore it” (Meier & Appenzeller, 2018). This argument is also referring to the constructivist understanding, where the common values of the

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<sup>8</sup> This is not an exhaustive list

member states are what the EU is representing. Those values are the very identity of it and its member states and therefore they cannot be discarded.

#### France

There were no substantial statements made by the French government about the situation in Hungary.

#### United Kingdom

There were no substantial statements made by the UK government about the situation in Hungary.

#### European Parliament

Judith Sargentini, who leads the draft proposal to the Civil Liberties Committee calling the European Council to determine the possibility of a risk of a serious breach by the Hungarian government to the article 2 of the TEU. She stated, “The Hungarian people can no longer count on the fundamental rights that we take for granted in the rest of Europe. In Europe, we commit ourselves to the shared values of respect for human dignity, freedom, democracy, equality, rule of law and human rights. Regrettably, Hungarians cannot be certain they will be given honest and equal treatment by their government” (Narillos, 2018a). She also added that this leads to her conclusion to propose to trigger the article 7 of the TEU, because “we need to stand up for the Hungarian people whose rights have been undermined” (Narillos, 2018a). She is taking the constructivist approach, stressing the importance of those values for the community and the need to protect the Hungarian citizens from their undemocratic government. She is also referring to those values as a social norm, an absolute necessity and a logical course of action for any government.

## European Commission

First Vice-President Frans Timmermans held a speech before the debate in the European Parliament on Hungary. He did say that the Commission has analyzed the law on the reform on the higher education in Hungary and it is not compatible with “internal market freedoms and the Charter of Fundamental Rights” (Timmermans, 2017). He also noted that the draft legislation on NGOs, if adopted, would be of concern regarding “the compatibility with the EU’s internal market rules, in particular the free movement of capital, and the EU Charter of Fundamental Rights, including freedom of assembly” (Timmermans, 2017). The new asylum law has also raised “serious doubts about compatibility with EU law” (Timmermans, 2017). The Commission will also “decide the need for further action to ensure full compliance with EU rules on maternity leave and gender equality in employment” (Timmermans, 2017). He also stressed, “The European Union has never been about “Brussels”. The European Union is a project driven and designed by its Member States, each of which has decided unilaterally and democratically that this is the path they wish to adopt” and all member states have “undersigned the rules of the “club” (Timmermans, 2017). These arguments are fact based and raise concerns with the compatibility of these laws with the EU treaties. These arguments can be understood using the rationalist theory, where the rules the member states have agreed upon need to be upheld in order for this cooperation under the EU work. (Hall & Taylor, 1996, p. 945)

He also added “civil society is the very fabric of democratic societies. We would not be democracies without strong and free civil societies” (Timmermans, 2017). He is referring to civil society as the very core of democracies and a social norm that should be followed. (Risse, 2004, p. 163)

## European Council

There were no substantial statements made by the European Council about the situation in Hungary

## **Conclusions**

Poland and Hungary are the two member states, whose actions are under question in regards to democracy, rule of law and fundamental values of the European Union, enshrined in the article 2 of the Treaty on the European Union. The arguments used commenting the potential breaches were analysed using two most prevalent theoretical approaches in the study of international relations and the study of the European Union. They are rational institutionalism and social constructivism.

Overall both theoretical approaches were relevant in both cases, but also across member state statements as well as statements made by the European Council, European Commission and the European Parliament. While there are clear differences theoretically to both of these approaches, there were number of cases, where the predominant narrative was either rationalist or constructivist.

In the Polish case the member states and the European Parliament had both used rationalist and constructivist arguments, when explaining why the article 2 should be protected in Poland. The European Commission used predominantly rationalist argumentation and the European Council predominantly constructivist argumentation. These results are very interesting as they actually are the opposite of the set hypotheses.

The main arguments the key member states used regarding the Polish case mostly fell under the rationalist theoretical framework. They saw the EU as an institution, whose laws provide mutual recognition and trust between the member states. If the laws are not followed, the trust is broken. Another widely used argument was, for mutual cooperation to achieve suboptimal outcome for all members, it is important to follow the law. The most used constructivist argument was that the values the EU is based on are a social norm and a logical course of action and therefore all member states should follow them.

The Parliament used predominantly constructivist arguments, the prevalent argument was also that the values of the EU are a societal norm and it makes sense for all



members to follow them. The rationalist argument used, was that all member states should follow the law in order to trust each other in mutual cooperation and negotiations, that is the very function of the EU. The European Commission used predominantly rationalist arguments, in order for the EU to function and be meaningful, all members should abide by the law and mutual trust is vital in cooperation. The Council used a constructivist argument referring to the values as the social norm and the only appropriate course of action.

In the Hungarian case the member states and the European Parliament used constructivist arguments, while the European Commission used both rationalist and constructivist arguments to defend the article 2 in Hungary. These results also are different to what the hypotheses predicted.

The main arguments used for the Hungarian case by the member states were the constructivist argument that the values of democracy, rule of law and fundamental rights are our identity and our societal norm and therefore they should be followed and protected by the member states. The European Parliament also used mainly the same constructivist notion, that it is appropriate to follow those values, as they are the social norm for the member states. The European Commission also used this constructivist argument of the values being our social norm. They raised a rationalist argument as well, stating, the member states need to follow the law in order for the EU to properly function as an institution.

The first hypothesis, that the European Commission will want to protect democracy, rule of law and fundamental rights using arguments that fall in line with the constructivist theory, proved to be false. In both cases the European Commission used predominantly rationalist arguments.

The second hypothesis, that the European Parliament, the European Council and the key three member states will use arguments that fall under the rationalist theory, also proved to be false. While in the Polish case the predominant arguments were rationalist in the case of the key member states, in the Hungarian case they were predominantly constructivist. The European Parliament and the European Council both used predominantly constructivist arguments in both cases.

In comparing the arguments made by all actors, it is clear that all actors agree, that the values of the European Union are fundamental and inherent to all member states. They are the social norm and a logical course of action. The member states agree, not following those rules not only goes against the social norm, but also threatens the whole union. If a member state does not have independent courts, then they are not able to guarantee the application of EU laws, protect investments or provide trustworthy decisions on criminal charges or civil disputes. These rationalist arguments were prevalent but they were often combined together with the constructivist approaches. Therefore I should conclude that they should not be seen as competitive approaches. Because they were often combined together, they should even be seen as complimentary theoretical frameworks in order to understand the reasoning for protecting the fundamental values of the European Union.

The hypotheses proved to be inaccurate, as they predicted that the European Commission will fall in line with the constructivist theory, while the member states, European Council and the European Parliament would use arguments that can be explained using the rationalist theoretical framework.

Another interesting find is that while the key member states, Commission, Council and Parliament all used the same arguments and it was possible to understand them through both the rationalist and constructivist theoretical approaches, there were two outliers within the European Parliament. While analyzing the debates held at the European Parliament, all member state representatives agreed, while only two member states opposed them. They were both the member states, which were under question regarding potential breaches to the article 2, Hungary and Poland. Their argumentation would not be compatible with the constructivist or the rationalist theory. This is a potential topic for further research, as it is equally as important to understand their position on the topic and how it can be so different from the rest of the European Union. However as this was not the topic of this thesis, their side was not included in the research.

## **Summary**

The aim of this thesis is to understand the reaction and action of the European Union in case of a possible breach to the common values of the European Union. These shared values as enshrined in the Article 2 of the European Union are the rule of law, democracy and fundamental rights. There is a potential for the application of the Article 7, the protection mechanism for those values, in two current situations, in Hungary and Poland. The research questions are: Is it possible to make sense of the European Union and member states reactions to the breach of rule of law, democracy and fundamental rights through a constructivist or a rationalist lens? Is there a variance between institutions and key member states, according to which factors? The research was conducted using the arguments of European Commission, the European Parliament, the European Council and the three biggest member states. Their argumentations were analysed using qualitative content analysis applying the two theoretical frameworks, rationalism and constructivism. There are two hypotheses. The first is that the European Commission will want to protect democracy, the rule of law and fundamental rights using arguments that fall in line with the constructivist theory. The second hypothesis is that the European Parliament, the European Council and the three member states will use arguments that fall under the rationalist theory.

The results of the analysis show, that the two theoretical frameworks, rational institutionalism and social constructivism were applicable in both cases. The main argument that fit with the rationalist narrative, were that the values need to be protected, because if a member state does not follow the EU law, it will undermine trust and the laws of the EU, making the functioning of the EU more difficult. For example, if a member state does not adhere to the rule of law and there is a problem of an independent judiciary, the application of the EU law in general will be problematic. The main argument used that fit the constructivist narrative was that the member states should follow the common values, because they are the social norm for the EU. Following those values is so fundamental and insuperable for the EU, and the member states identify themselves through those values. Therefore the rule of law, democracy

and fundamental rights should be protected. Both of these narratives were used by all of the member states, but also the institutions. In the Hungarian case, the predominant narrative used by the member states and the European Parliament was the constructivist perspective, while the European Commission used both constructivist and rationalist arguments. In the Polish case the member states and the European Commission used predominantly rationalist argumentation, while the European Parliament and the European Council used predominantly constructivist argumentation. Therefore both of the hypotheses proved to be false. Both of the theoretical frameworks, rationalism and constructivism are important in discussing and understanding the reaction and action of the EU in the case of potential violations of the common values, democracy, rule of law and fundamental rights.

While the thesis looked into the argumentation used by the EU, the thesis could be followed up with research into the Polish and Hungarian perspectives. Their argumentations were a part of this thesis in that they were also included in the statements of the institutions, and therefore they were a part of the reactions and actions to the cases of Poland and Hungary. When looking into their argumentations, they did not fit under the rationalist or the constructivist theoretical frameworks. Finding a suitable theoretical framework for understanding the Hungarian and Polish perspectives on the potential breaches to the common values is a possible topic for further research.

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I, Kadi Erik, (personal code

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